No. 89-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMBINED INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

THOMAS AINSWORTH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY MEMORANDUM

Of Counsel:

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

*STEPHEN L. MORRIS
M. KRISTINA PICKERING
LIONEL SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 383-8888

GEOFFREY C. HAZARD, JR.
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4971

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

REPLY MEMORANDUM

The constitutional issue presented by this case is a substantial one and of national importance. Mr. Ainsworth does not dispute this—and indeed hardly could. Words uttered only recently from this bench, and uttered with intense conviction, attest to the significance of the constitutional contention here presented. Mr. Ainsworth quite naturally would prefer that his verdict for punitive damages stand, and that the Court examine in some other case whether the process by which that verdict was reached can withstand constitutional scrutiny. He has a laundry list of reasons why his case is not, as he views it, the right case, but his opposition is largely constructed of subtle mischaracterizations and facile manipulation of the facts of record. Questions of federal constitutional law that impact heavily the administration of civil justice throughout the Nation deserve better and more candid treatment than this.

1. The Constitutional Issue Was Presented and Decided In the Nevada Supreme Court

Mr. Ainsworth contends the Nevada Supreme Court did not "decide" the constitutional issue. Opp. at 13-15. The rule is that the federal claim has to have been *"either* raised in the state court *or* considered and resolved by the state court." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 150 (6th ed. 1986) (emphasis in original). Both tests have been satisfied here.

In its opinions and several orders the Nevada Supreme Court: (1) declared and later reaffirmed its conclusion that, notwithstanding *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), and *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645 (1988), "there is no indication that the United States Supreme Court will overturn its prior decisions upholding the constitutionality of punitive damages," and that until it does, the Nevada court is justified in dismissing Due Process challenges to punitive

damages, App. at 130a-131a; *see also* App. at 21a; (2) rejected Combined's constitutional arguments with the statement that "[o]ther contentions have been considered and are deemed to be totally without merit," App. at 69a, (3) recognized that "the major focus of Combined's argument in its briefs on appeal was that the verdict constituted an excessive fine or a violation of Due Process under the constitution," App. at 14a; and (4) criticized Combined for having devoted attention to the constitutional question. *Id.* The state supreme court also declined Mr. Ainsworth's several invitations to avoid the constitutional challenge on the basis of a never-before-followed procedural bar.[1]

These are the record facts. They establish that the Nevada court considered and summarily rejected Combined's constitutional challenge on the merits.[2] The Nevada

---

[1] On direct appeal, Mr. Ainsworth debated the merits of the Due Process issue extensively, App. at 101a-105a, 114a-126a and 136a-140a, but he also argued that the constitutional challenge should have been raised in the trial court. App. at 101a. He expanded the latter argument in his opposition to Combined's motion for a stay pending application to this Court for a writ of certiorari, devoting fully eight pages to this point. While having thus been invited to overrule or distinguish its prior cases supporting Combined's procedural position, the Nevada Supreme Court chose not to do so.

[2] The recent Nevada Supreme Court decision in *United Fire Insurance Co. v. McClelland*, 1989 WL 102842 (Sept. 6, 1989), confirms this reading of the opinions in this case. The record in *United Fire* included these remarks by the trial judge, denying judgment nov:

> On [the constitutional] issue, the Nevada Supreme Court has ruled just days ago [in *Ace Truck*] and decided not to declare [punitive damages] unconstitutional. The United States Supreme Court has not ruled. It may develop some standards, but this is the trial court, and as a state system, aren't I bound to follow the Nevada Supreme Court--a Supreme Court ruling which does not hold it unconstitutional until such time as it is?

RT 12/17/87 at 39. In the *United Fire* trial judge's view, "the Nevada

Supreme Court said that the constitutional issue was "the major focus of [Combined's] briefs on appeal," App. at 14a, but Mr. Ainsworth calls this "simply a misstatement [by the court]." Opp. at 14, n.12. The Nevada Supreme Court stated that "[o]ther contentions *have been considered and* are deemed to be totally without merit," App. at 69a (emphasis added), but Mr. Ainsworth says that "could only have represented a judgment based on state procedural grounds." Opp. at 13-14. The words italicized in this quotation from the Nevada Supreme Court—*have been considered*—are omitted in Mr. Ainsworth's quotation of this very passage! *Compare* App. at 69a *with* Opp. at 13.[3]

Supreme Court has inferentially, at least, said punitive damages are constitutional . . . [a]nd I don't have a decision from the U.S. Supreme Court, so I feel inclined that I have to follow the constitutionality of it in our state system until a [higher] Court tells me otherwise." RT 12/17/87 at 43. With this plea for guidance from a well-respected trial court judge, the Nevada Supreme Court—which is Nevada's only appellate court—said nothing on the constitutional question in its *United Fire* opinion, except that "[h]aving reviewed appellant's other claims of error, we conclude that they lack merit." Slip op. at 13. This is, of course, more or less the same treatment Combined's constitutional claims received.

[3] Mr. Ainsworth's statement that Combined "did not demonstrate any seriousness" in its constitutional claims and devoted just "two pages" to them, Opp. at 6, is another serious and misleading misstatement. Mr. Ainsworth's ostensibly complete procedural history omits all mention of Combined's statement of issues on appeal, motion to postpone argument, first and second supplemental authorities, and central argument that the standardless decision-making Nevada's punitive damage system invites does not pass constitutional muster. If the system is to have any viability at all, exhaustive review of the facts of the sort correctly engaged in by the trial court in its opinion granting judgment nov is essential. App. at 86a-100a. This remained Combined's theme throughout. App. at 86a, 87a-100a, 108a-113a, 127a-129a, 132a-135a, 141a-144a. And Mr. Ainsworth devoted almost twenty-five pages in *his* briefs to dealing with the constitutional issue. App. at 101a-105a, 114a-127a, 136a-140a.

2. The Nevada Supreme Court Does Not Recognize or Apply the "Procedural Bar" Asserted by Mr. Ainsworth to This Court's Jurisdiction

A state court decision will not be interpreted as resting on an unarticulated procedural bar where the bar would not have been valid had it been directly invoked. *Ulster County Court v. Allen*, 442 U.S. 140, 146-53 (1979); *see Taylor v. Illinois*, 108 S. Ct. 646, 651, 657-59 (1988); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Nevada Supreme Court's practice of routinely considering constitutional questions raised for the first time on appeal in itself dispositively establishes that Combined's constitutional challenge was properly before that court.[4] Even if Nevada law were otherwise—and it is not—Combined's presentation was timely and therefore this Court has jurisdiction.

Trial judges in Nevada, like trial judges elsewhere, cannot unnecessarily decide constitutional issues. *See Nevada*

---

[4] *See* Combined's Petition at 9, n.4 and cases cited therein. Mr. Ainsworth accuses Combined of misreading the cases it cites, Opp. at 13, n.11, but he does not substantiate this statement. The only case he cites is *Wilkins v. State*, 96 Nev. 367, 609 P.2d 309 (1980), where the defendant failed to object even in generic terms to the admission of the complained-of evidence in the trial court. In the present case Combined objected to the instruction on punitive damages and thereafter to the verdict *and* its excessiveness. *See* Combined's Motion for Judgment NOV. The Nevada Supreme Court routinely considers constitutional questions whether or not they were raised in the trial court, a point Mr. Ainsworth is not able seriously to contest. This dispositively distinguishes *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), relied on by Mr. Ainsworth to defeat jurisdiction. Here the Nevada Supreme Court not only was empowered to consider Combined's constitutional arguments but said that they "have been considered" and are "deemed to be totally without merit," whereas in *Eagerton* the Alabama Supreme Court's prior cases prohibited the raising of constitutional issues for the first time on appeal and thus the Alabama court "did not pass on the issue" of state law preemption by a federal statute. *Id. Eagerton* is inapposite.

Tax Comm'n v. Boerlin, 38 Nev. 39, 46, 144 P. 738 (1914). The *trial judge* in this case *ruled in favor of Combined on state law grounds*. The Nevada Supreme Court addressed the Due Process issue *because* it had reversed the trial judge so far as state law was concerned.

Combined's challenge to the unconstitutional vagueness of Nevada's punitive damage system was properly before the Nevada court and necessarily rejected by that court when it entered judgment on the jury verdict. When "the necessary effect of the judgment has been to deny the [federal] constitutional claim [, a] state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 150-51 (6th ed. 1986) (citations omitted).

Mr. Ainsworth tries to avoid this rule of jurisdiction by characterizing Combined's challenge, not as one to a sanctioning system that is void-for-vagueness, but as a challenge to the jury instruction on punitive damages to the "content" of which he says Combined failed to object. Opp. at 12. This argument is misleading because Combined objected to the instruction as *inapplicable* on the facts, even though it correctly stated Nevada law. This was a position the trial judge later sustained. A party objecting to a rule on vagueness grounds is not required to formulate the specifics omitted by the legislature or the court that fashioned the rule. If a standardless conduct-regulating statute is to be "construed" to save it from invalidity, the construction must be by "a state court or enforcement agency," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982), not the defendant, before the statute is applied. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("a penal statute [should] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"); *United States v. Reese*, 92

U.S. 214, 221 (1876); *Kev, Inc. v. Kitsap County*, 793 P.2d 1053, 1057 (9th Cir. 1986) ("due process requires that laws set forth reasonably precise standards for law enforcement officials and triers of fact to follow," citing *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974), and *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

Combined does not suggest that the "instruction itself was error; indeed, it [was] a correct statement of [Nevada] law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan & Marshall, JJ., concurring). Mr. Ainsworth mischaracterizes this petition as a request for "a new trial." Opp. at 23. If Combined was adjudged liable for $6 million in punitive damages under a constitutionally infirm scheme, its remedy here would be the same as that granted by the trial court: the judgment against it must be reversed. *See Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Stromberg v. California*, 283 U.S. 359 (1931).

3. The Constitutional Question Presented By This Petition Has Been Considered By State and Federal Courts Nationwide and Is Ripe for Decision By This Court.

Mr. Ainsworth suggests there are "prudential" reasons why this Court should further defer decision of the important constitutional issue identified in *Aetna*, more than three years ago. Mr. Ainsworth acknowledges that *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 102 Nev. 503, 746 P.2d 132 (1987), and Nevada Assembly Bill 307 are Nevada's judicial and legislative "answer" to *Aetna, Bankers Life*, and *Browning-Ferris*. However, he argues that this Court should "wait and see" how these "reforms" work out. Opp. at 17-21.

Ace Truck and AB 307 do not materially "reform" Nevada law, they reiterate it. While *Ace Truck* tries to unify the common law "financial annihilation," "shock the conscience," and "passion and prejudice" tests[5] into a single standard, it leaves juries without fixed standards and reviewing courts with criteria no more definite than our "childhood sense" of right and wrong. *Id.* at 136-37. The result of a proceeding conducted according to Due Process will satisfy a "sense" of right and wrong but that "sense" is a product of, not a substitute for, Due Process.

AB 307 also perpetuates the deficiencies in Nevada law. Faced with *Aetna, Bankers Life*, and the imminent decision in *Browning-Ferris*, the Nevada legislature chose *not* to place any objective limits on punitive damages in insurance bad faith, products liability, and defamation actions. App. at 201a-203a. It took this course based on testimony by Mr. Ainsworth's lawyers, and others, to the effect that "the [United States] Supreme Court is not going to hold punitive damages unconstitutional" and that, in exempting these categories of cases from objective limits, the Nevada legislature should not be concerned with what this Court may do. App. 218a. Mr. Ainsworth urges deference to the Nevada legislature's "intimate knowledge" of "local conditions" that require limitless awards in insurance bad faith and products liability cases because "such behavior requires a greater measure of deterrence in Nevada." Opp. at 20, n.16. These "local conditions" are not identified. Whatever they are, they do not suspend the operation of the federal Constitution in Nevada.

This record is more than adequate to consider Combined's constitutional claims. Rightly or wrongly, courts

---

[5] All three of these common law tests were applied, together with the *Ace Truck* test, to justify entry of judgment on the punitive damage verdict here. Far from detracting from this case's "cert-worthiness," the Nevada Supreme Court's analysis of the verdict under every conceivable common law test makes this case uniquely typical of cases across the Nation.

across the country are refusing to take the Due Process issue seriously and will continue to do so unless and until this Court acts. Like the Nevada courts and legislature, they have taken the point as settled by the Court's prior cases.

In the month since Combined's petition was prepared, several more courts have acknowledged the constitutional issues raised by the standardless imposition of punitive damages but have declined to do anything about them. *See, e.g., Juzwin v. Amtorg Trading Corp.*, 1989 WL 101504 (D.N.J. Sept. 5, 1989) (multiple awards of punitive damages for same act violate due process but lower courts are "powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated" until "there is uniformity either through [United States] Supreme Court decision or national legislation"); *Howe v. Varity Corp.*, 1989 WL 95595 (S.D. Iowa, July 14, 1989) (rejects due process challenge to punitive damages); *Central Alabama Elec. Co-op v. Tapley*, 546 So.2d 371, 377 (Ala. 1989) (juries are human institutions not amenable to a "set of carved-in-granite standards that would guide every jury in every conceivable case." Due process challenge to punitive damages rejected); *Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 1989 WL 91224 (Aug. 16, 1989) (punitive damages affirmed on Ohio law, but concurring judges question wisdom of allowing juries to "ponder punitive damages without proper guidelines"); *George v. Int'l Society for Krishna Consciousness of Calif.*, 1989 WL 101012 (Cal. Ct. App. Aug. 30, 1989) (due process implicated in punitive damage cases but is outweighed by deterrence value of such damages). The Fifth Circuit approached the question a little differently in *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1989 WL 92189 (5th Cir. Sept. 5, 1989), when it assumed, but did not decide, that punitive damages are subject to Due Process and held that the facts of liability

there satisfied Due Process for the imposition of punitive damages in a Mississippi insurance bad faith case.

The Nevada Supreme Court, like courts around the land, is unwilling even to consider Due Process challenges to the common law of punitive damages unless and until this Court prompts them to do so. They have taken the Court's decisions in *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851), *Smith v. Wade*, 461 U.S. 30 (1983), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973), as declaring the common law of punitive damages constitutional as it now exists, as is illustrated by the Nevada trial judge in *United Fire, supra* n.2, who said "I don't have a decision from the U.S. Supreme Court, so I feel inclined that I have to follow the constitutionality of it in our state system until a [higher] Court tells me otherwise." This attitude of the courts makes comprehensible, not contemptible, the Nevada Supreme Court's summary rejection of Combined's constitutional arguments, but it does not assist litigants like Combined who are struggling to obtain a judicial response to serious Due Process challenges to standardless and increasing multi-million dollar punitive damage awards.

CONCLUSION

The time has come for this Court to say whether the Due Process Clause permits the States to license civil juries to award punitive damages without establishing standards on how those damages are to be measured. More delay in addressing this problem will confer a windfall on Mr. Ainsworth, who was fully compensated for his injuries three years ago, and will impose wasteful and perhaps needless litigation on the Nation's courts.

Respectfully submitted,

*STEPHEN L. MORRIS
M. KRISTINA PICKERING
LIONEL SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 383-8888

GEOFFREY C. HAZARD, JR.
127 Wall Street
New Haven, Connecticut 06520
(203) 432-4971

Attorneys for Petitioner

**Counsel of Record*

Of Counsel:

CHARLES ALAN WRIGHT
737 East 26th Street
Austin, Texas 78705
(512) 471-5151